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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-50

EMMETT HENDERSON and DORIS COLLINS,
Petitioners,

v.

JOYCE ST. HILAIRE MOYE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is now reported in 496 F.2d 973 (8th Cir. 1974).

JURISDICTION

The petitioner asks this court to grant certiorari because of a conflict in the Circuits, but as pointed out *infra*, no conflict exists as to the precise question herein presented.

QUESTION PRESENTED

We take issue with the way in which petitioner frames the question in this case. Petitioner's question includes the statement that the "tort . . . had no relationship to maritime . . . navigation." This statement is not correct. The plaintiff was a passenger in a rather large and powerful pleasure boat being navigated in the main channel of the Arkansas River Navigation Project. The question is whether admiralty jurisdiction extends to the operation of such a vessel on a navigable stream.

STATEMENT OF THE CASE

Plaintiff was a guest in an 18 foot, 225 h.p. motor cruiser being operated on the Arkansas River. The boat was owned by Basil Henderson and was in the charge of his son, Emmett Henderson. Bill Hobson, also a guest, was operating the boat when he entrusted its operation to Doris Collins, another guest, with the acquiescence of Emmett Henderson. She had never operated a boat of this type, and the Court found that she was "feeling and manifesting" the effects of intoxicants. While the boat was operating at a high speed, she suddenly threw it into reverse causing it to partially capsize and throw plaintiff out of the craft into the river. Plaintiff was struck by the propeller and seriously injured.

Suit was filed in admiralty and tried to the court. The court found that defendant Doris Collins "falsely represented her ability to operate the boat, that she undertook to operate it while intoxicated to some degree, and that she was guilty of negligence when she threw the vessel into reverse gear." The court found that Emmett Henderson was "guilty of negligence in permitting her to operate the boat over the protest of Carolyn McRae at a time when he knew or should have known that Mrs. Collins was feeling the effect of her drinks." The Court of Appeals affirmed a substantial judgment in plaintiff's behalf.

ARGUMENT

I

Admiralty Jurisdiction Existed in This Case.

There are three decisions in this court in which admiralty jurisdiction was asserted over maritime torts involving pleasure craft. They are *Levinson v. Deupree*, 354 U.S. 648 (1953); *Coryell v. Phipps*, 317 U.S. 406 (1943); and *Just v. Chambers*, 312 U.S. 383 (1941). Cases in the inferior Federal Courts are legion. Some of the Circuit Court of Appeals decisions asserting admiralty jurisdiction over pleasure craft are: *In re Reading's Petition*, 217 F.2d 959 (2d Cir. 1959); *The Mistral*, 50 F.2d 947 (2d Cir. 1931); *Schoremeyer v. Barnes*, 190 F. 2d 14 (5th Cir. 1951); *Feige v. Hurley*, 89 F.2d 575 (6th Cir. 1937); *Rautbord v. Ehmann*, 190 F.2d 533 (7th Cir. 1951); *Loc-Wood Boat & Motors, Inc. v. Rockwell*, 245 F.2d 306 (8th Cir. 1957); *Isaacson v. Jones*, 216 F.2d 599 (9th Cir. 1954). Jurisdiction has been refused, as pointed out by the Court of Appeals, in a few cases involving swimmers, water skiers, and divers. This is not such a case. Instead it involves the operation of an eighteen foot, 225 horsepower vessel in the main channel of the Arkansas River Navigation project, one of the most important commercial waterways in this country. As Judge Van Oosterhaut so aptly pointed out, "The navigation of waterborne vessels on those waters, even if not directly engaged in commerce themselves, presents a potential danger to the operation of vessels which are engaged in commerce on those waters." 496 F.2d 973, 979.

Petitioners urge that this great mass of authority was impliedly obliterated by *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), a case without any factual similarity to the instant case. A chartered plane took off from the

Cleveland Airport, which is adjacent to Lake Erie. The plane was on a flight to Portland, Maine. As it took off, the engines ingested sea gulls and the plane lost power. It turned back toward the runway, struck a portion of the airport fence and a parked truck. It then settled in Lake Erie just off the end of the runway about 300 yards from the shore. This court found that the operation of this aircraft between two points of land had little to do with the focus or purpose of the law of admiralty. 409 U.S. 249, 268. The fact that this plane ended up in Lake Erie was wholly fortuitous and completely unrelated to the tort itself. *Id.* at 267.

Neither the facts nor the rationale of this case bear relationship to the case at bar. Writing for the Eighth Circuit, Judge Van Oosterhout has put it in proper perspective:

> A close reading of the *Executive Jet* decision would support an interpretation limiting its holding to situations involving aircraft. Justice Stewart extensively discussed the differences between aircraft and waterborne vessels, 409 U.S. at 261-72, and that difference was the essential basis for the Court's holding. Justice Stewart explicitly limited the rejection of the locality test to aviation tort cases. 496 F.2d 973, 978.

The petitioners contend as a basis for certiorari that there is a conflict in the Circuits as to the effect of *Executive Jet* on cases involving pleasure craft on navigable streams. We do not find such a conflict. In *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. den.* — U.S. — (1974), the maritime tort involved a 15-foot outboard pleasure boat. *Oppen v. Aetna Ins. Co.*, 485 F.2d 252 (9th Cir. 1973) also involved pleasure craft. *Crosson v. Vance*, 484 F.2d 840 (4th Cir.), which petitioners claim is in conflict with the Fifth, Eighth, and Ninth Circuits, is really not in conflict at all. That case involved injury to a waterskier and not to a passenger in a pleasure craft.

The court specifically avoided the issue posed by the latter situation. "For our present purposes, therefore, we need not speculate whether the Supreme Court's opinion in *Executive Jet Aviation* would foreclose resort to admiralty in any case involving the operation of small pleasure craft." 484 F.2d 840, 842.

In addition to the case law, there is powerful support for admiralty jurisdiction in the statutes of the United States, where a vessel is defined as follows: "The word vessel includes every description of watercraft or other artificial conveyance used, or capable of being used as a means of transportation on water." 1 U.S.C. § 3. In another statute it is stated that "the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river. . . ." 46 U.S.C. § 713. The Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 940 provides in part: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." Significantly, none of these statutes make a distinction between commercial and pleasure craft.

CONCLUSION

We therefore respectfully request that the petition for certiorari be denied.

Respectfully submitted

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Certificate of Service

I hereby certify that on this 20 day of August, 1974, three copies of the Brief of Respondent in Opposition to Petition for a Writ of Certiorari were mailed, postage prepaid, to James D. Storey and Gordon S. Rather, Jr., Wright, Lindsey & Jennings, 2200 Worthen Bank Building, Little Rock, Arkansas 72201, and George Pike, Jr., Smith, Williams, Friday, Eldredge & Clark, 1100 Boyle Building, Little Rock, Arkansas 72201, counsel for the Petitioners.

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